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Submitted via Regulations.gov

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The Environmental Protection Agency
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Washington, DC 20460;
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Re: Docket ID No. EPA-HQ-OW-OW-2020-0008

Dear Ms. Hurlb:

On behalf of our approximately six million members and supporters, the National Wildlife Federation (the Federation or NWF) submits the following comments regarding Docket ID EPA-HQ-OW-OW-2020-0008, requesting comment on whether the United States Environmental Protection Agency's (EPA) approval of a Clean Water Act (CWA) Section 404 program is a non-discretionary action for the purposes of the Endangered Species Act (ESA) Section 7 consultation. As detailed below, approval of state assumption by EPA under Section 404 of the CWA is a discretionary action that requires ESA consultation to ensure that assumption will not jeopardize ESA listed species. Moreover, consultation of state assumption under Section 404 cannot provide future permittees blanket exemption from ESA compliance. Consultation and state assumption must allow for a meaningful process to enable the U.S. Fish and Wildlife Service (the Service or FWS) and the National Marine Fisheries Service (NMFS) to review projects and ensure permitted activities account for any takes or impacts to listed species that may occur.

The National Wildlife Federation is the nation's largest conservation education and advocacy organization with almost six million members and supporters, and affiliate conservation organizations in 52 states and territories. The Federation has a long history of working to protect and restore the nation's rich array of natural resources and the fish and wildlife that depend on those resources, including our nation's wetlands and other waters. The Federation has extensive experience working with, interpreting, and using the Clean Water Act and the Endangered Species Act to protect aquatic habitats and the species that rely on them.

Background and Context

The EPA's solicitation of these comments comes in the context of a request from the Florida Department of Environmental Protection (FDEP) to revisit the question of whether EPA has an

obligation to consult with the Service and NMFS on approval of state assumption of Section 404 permitting under the CWA. Florida is considering requesting approval from EPA to assume Section 404 of the CWA. Florida is a state with abundant wetlands and water resources, many listed species under the ESA that rely on such waters, and intense development and other pressures impacting those waters that require regulation under Section 404 of the CWA. Florida has 135 ESA-listed species (the third most of any state) and it is estimated that approximately ten percent of Section 404 permits issued in Florida require some form of incidental take coverage.¹

In 2010, the EPA, which has previously consulted on approval of state assumption, was asked by the Association of State Wetlands Managers (ASWM) how the Supreme Court decision in *National Association of Homebuilders v. Defenders of Wildlife* (NAHB) might impact approval of Section 404 assumption requests.² In NAHB, a divided Court ruled that EPA did not have discretion to consult under ESA Section 7 when approving state assumption of the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) program because the CWA mandates EPA's approval if enumerated factors are met.³ The Court found that those enumerated factors did not give EPA the discretion to consider impacts on ESA listed species.⁴ In response to ASWM's request, EPA concluded in a two-page letter that it did not have discretion to approve assumption of the Section 404 program.⁵

FDEP has asked EPA to reconsider its 2010 position and conclude that EPA does have discretion and should consult under ESA Section 7 when approving state assumption of the CWA Section 404 permitting program. FDEP's motives, however, do not seem to be driven by a concern for listed species. What FDEP instead appears to be seeking – under the pretense of streamlining and efficiency – is to get out from under concerns over ESA compliance should it assume the Section 404 program.⁶ FDEP, through a white paper submitted to EPA, is urging EPA and the wildlife agencies to issue a one-time biological opinion and programmatic incidental take statement (ITS) to give the state program and those who receive permits under it an effective blanket shield against ESA liability.⁷ While FDEP is right that EPA should consult under ESA Section 7 before approving Section 404 state assumption, such consultation cannot result in the state program receiving an effective blanket shield from ESA liability.

¹ FDEP Summary Paper - ESA Consultation with Assumption Approval (via email from Noah Valenstein, FDEP, to Matt Leopold, EPA, and David Ross, EPA dated July 17, 2019), available at <https://beta.regulations.gov/document/EPA-HQ-OW-2020-0008-0008> (visited July 5, 2020).

² *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

³ *Id.* at 673.

⁴ *Id.* at 646.

⁵ Letter from Peter S. Silva, Assistant Admin., EPA, to R. Steven Brown, Exec. Director, Env. Council of the States, to Jeanne Christie, Exec. Director, Ass'n of Wetland Managers, Inc. (Dec. 27, 2010) available at <https://beta.regulations.gov/document/EPA-HQ-OW-2020-0008-0002>.

⁶ FDEP "White Paper" on ESA Consultation with Assumption Approval (via email from Noah Valenstein, FDEP, to Matt Leopold, EPA, and David Ross, EPA dated July 17, 2019), available at <https://beta.regulations.gov/document/EPA-HQ-OW-2020-0008-0008> (visited July 5, 2020) (FDEP White Paper).

⁷ *Id.*

The Duty to Consult under the Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁸ In enacting the ESA, “Congress has made ‘a conscious decision *** to give endangered species priority over the ‘primary missions’ of federal agencies.”⁹ Section 7 of the ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat.¹⁰ An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species.¹¹

FWS regulations governing ESA consultations define “action” to include “the promulgation of regulations.”¹² The agency that “authorized, funded, or carried out” the action must consult with FWS or NMFS to insure that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . .”¹³ In the consultation process, “each agency shall use the best scientific and commercial data available.”¹⁴

Section 7(a)(2) of the ESA imposes procedural and substantive requirements on federal agencies. First, the agencies must consult with the FWS to determine threats to the species and critical habitat.¹⁵ Second, the agencies must make sure that their actions do not jeopardize the identified species and critical habitat.¹⁶ The joint regulations released by the FWS and NMFS mandate that, “Section 7 . . . apply to all actions in which there is discretionary Federal involvement or control.”¹⁷ Federal agencies must review their actions to ensure that no listed species are affected.¹⁸ If listed species or their critical habitat are found in the action area, either formal or informal consultation must take place.¹⁹ Informal consultation ends with a concurrence issued by FWS or NMFS.²⁰ Formal consultation ends with FWS or NMFS delivering a biological opinion to the action agency.²¹

If the FWS or NMFS finds “jeopardy or adverse modification” to a listed species or its critical habitat, “[FWS or NMFS] shall suggest those reasonable and prudent alternatives which [it] believes would not violate subsection (a)(2).”²² If the Service concludes that the action is not likely to jeopardize listed species, but that incidental take is reasonably likely to occur, the Service is required to provide an ITS that: specifies the impact of such incidental taking on

⁸ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁹ *Id.* at 185.

¹⁰ 16 U.S.C.A. § 1536(a)(2).

¹¹ 50 C.F.R. § 402.14(a).

¹² *Id.* § 402.02.

¹³ 16 U.S.C.A. § 1536(a)(2).

¹⁴ *Id.*

¹⁵ *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1138 (11th Cir. 2008).; 16 U.S.C. § 1536(b).; 16 U.S.C. § 1536(a)(2).

¹⁶ *Id.*

¹⁷ 50 C.F.R. § 402.03.

¹⁸ *Id.* § 402.15.

¹⁹ *Id.* § 402.10.

²⁰ *Id.* § 402.13.

²¹ *Id.* § 402.14.

²² 16 U.S.C.A. § 1536(b)(3)(A).

the species; specifies those reasonable and prudent measures considered to be necessary or appropriate to minimize such impact; in the case of marine mammals, specifies those measures that are necessary to comply with statutory provisions in regard to such taking; and sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or the applicant, or both, to implement the any required protective measures.²³

CWA Section 404 and State Assumption

Congress enacted the CWA to “restore and maintain the chemical, physical and biological integrity of the nation’s waters.”²⁴ The goals and objectives of the CWA are to “eliminate pollution in the nation’s waterways and to preserve recreational opportunities and maintain biological systems.”²⁵

Under the CWA, discharges of dredge or fill material into waters may be permitted under Section 404 of the Act.²⁶ The U.S. Army Corps of Engineers (Corps) administers the Section 404 permitting program.²⁷ In order to be permitted for dredge and fill activity, the permittee, *inter alia*, must show that there are no alternatives to the proposed activity, the activity will not seriously degrade or significantly harm an aquatic environment, and if it does, the degradation was unavoidable or exempted.²⁸

Under the CWA, states, with EPA approval, can assume Section 404 permitting from the Corps.²⁹ To assume Section 404 permitting, state laws must meet minimum federal requirements, comply with Section 404(b)(1) guidelines regulating the issuance permits, and ensure adequate enforcement.³⁰ Additionally, federal oversight by the EPA, Corps, FWS, and NMFS of state permitting is required.³¹ A memorandum of agreement (MOA) between Federal agencies and the state assuming the program should be entered into in order to guarantee compliance with federal regulation and maintenance of jurisdictional oversight of federally protected sites, species, and state-specific projects.³² While federal oversight of state permitting can be waived in certain circumstances once state assumption occurs, it cannot be waived for “[d]ischarges with reasonable potential for affecting endangered or threatened species....”³³

EPA Approval of Section 404 State Assumption and the Duty to Consult

As stated above, in 2010, in a two-page letter to the Association of State Wetlands Managers, the EPA relied on *NAHB* to conclude that approval of state assumption of the Section 404 program is

²³ *Id.* § 1536(b)(4).

²⁴ 33 U.S.C.A. § 1251.

²⁵ S. REP. 95-370.

²⁶ 33 U.S.C. 1344(a).

²⁷ *Id.*; *id.* § 1344 (g)(1).

²⁸ 40 C.F.R. § 230.10 (a)-(b).

²⁹ 33 U.S.C. §§ 1344 (g).

³⁰ *Id.* § 1344 (h).

³¹ 40 C.F.R. § 233.50.

³² *Id.* § 233.13(a).

³³ *Id.* § 233.51(b)(2).

a non-discretionary agency action that does not require ESA Section 7 consultation.³⁴ The *NAHB* case hinged on whether ESA consultation was required to transfer permitting authority to the state under Section 402 of the CWA, which governs state assumption of the Act's other chief permitting program, the NPDES.³⁵ Section 402(b) lists nine criteria that, if met, require that the administrator “*shall approve*” state the assumption, none of which contemplate consideration of ESA listed species.³⁶ Deferring to agency regulation that limited ESA consultation to “discretionary” actions, the court determined that EPA did not have discretion to consider species concerns under Section 402(b) and therefore was not required to consult under Section 7 of the ESA when approving state assumption of the NPDES program.³⁷

EPA's 2010 letter did not correctly interpret the law and should be reversed. Unlike Section 402(b) of the CWA, Sections 404(g) and (h), which govern state assumption of the Section 404 program, give EPA ample discretion – and indeed direction – to consider ESA listed species in approving state assumption.³⁸

Section 404(g) articulates that when a state applies for assumption, the EPA is required to provide “the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service” an opportunity to comment on a state's assumption application.³⁹ Likewise, Section 404(h)(1) states that the EPA must “tak[e] into account any comments submitted by ... the Secretary of the Interior, acting through the Director of [FWS]” under Section 404(g) when making its determination to approve or deny assumption.⁴⁰ Additionally, Section 404(h)(1) explicitly states that the EPA must determine whether state issued permits will “assure compliance with . . . the guidelines established under subsection (b)(1).”⁴¹ These guidelines require consideration of threatened and endangered species, stating that permits may not be issued if the activity would “[j]eopardize[] the continued existence of species listed as threatened or endangered under the [ESA].”⁴² Thus, Sections 404(g) and (h) – contrary to the enumerated requirements of Section 402(b) – directly address species concerns and provide broad authority for EPA to consider the protection of the ESA listed in determining whether to approve state assumption of the Section 404 program. As such, state assumption is a federal action that requires EPA to consult with the FWS and NMFS under the ESA.

Consultation Can Not Provide a Blanket ESA Liability Shield for State Programs

While EPA must consult with the FWS and NMFS under Section 7 of the ESA on whether state assumption of the Section 404 program will affect listed species, given that state assumption involves the future permitting of a multitude of unknown actions in unknown locations, an

³⁴ Letter from Peter S. Silva, Assistant Admin., EPA, to R. Steven Brown, Exec. Director, Env. Council of the States, to Jeanne Christie, Exec. Director, Ass'n of Wetland Managers, Inc. (Dec. 27, 2010) available at, <https://beta.regulations.gov/document/EPA-HQ-OW-2020-0008-0002>.

³⁵ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, at 644.

³⁶ 33 U.S.C.A. § 1342(b) (emphasis added).

³⁷ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, at 645.

³⁸ 33 U.S.C.A. § 1344 (g); *Id.* § 1344 (h).

³⁹ *Id.* § 1344 (g).

⁴⁰ *Id.* § 1344 (h)(1).

⁴¹ *Id.*; 40 C.F.R. § 230.1.

⁴² 40 C.F.R. § 230.10 (b)(3).

incidental take permit cannot be issued that reasonably accounts for myriad future unknown takes to a wide array of species that may occur under continually changing circumstances. However, FDEP is arguing that a one-time biological opinion and programmatic incidental take statement (ITS) can be issued to provide effective blanket coverage of future state issued permits against ESA liability. As FDEP states:

[Consultation] would allow the Services to issue a programmatic Biological Opinion (“BiOp”) and a programmatic incidental take statement (“ITS”), which would identify procedural requirements for state permitting under Section 404 needed to support the Services determination that assumption would not result in jeopardy to any listed species. Provided these requirements are followed, the programmatic ITS would bring state Section 404 permits within the Section 7(o)(2) exemption from take liability.⁴³

FDEP relies on a single case for its argument, *Cooling Water Intake Structure Coalition v. EPA*, in which the Second Circuit upheld a programmatic approach to allowing incidental take in the context of promulgating a rule for the CWA permitting of cooling water intake structures.⁴⁴ However, the regulation of cooling water intake structures differs greatly from future regulation of dredge and fill activities. Cooling water intake structures exist for a relatively small number of uses – primarily electric generating units (power plants).⁴⁵ The vast majority of these plants are already permitted, there exists extensive data on how these plants and their operation impact listed species, and consultation largely covered these already permitted activities and the extensive data detailing their impact on species.⁴⁶

In contrast, the assumption of Section 404 dredge and fill permitting program involves a multitude of vastly differing future activities that are unknown and unpermitted at the time of consultation. These wide-ranging activities have the potential to significantly “degrade or destroy” a multitude of waters of the United States, from small streams, to varying types of wetlands, to major rivers, lakes, estuaries, and other waters. In short, in the case of state assumption, the differing and unknown impacts and takes simply cannot be reasonably assessed at the time of consultation to support an ITS.

As stated above, in Florida alone activities under an assumed Section 404 program could affect about 135 listed species in activities ranging from mining to farming to commercial development. The impacts to these 135 species from a wide variety of still unknown activities, in unknown habitat, at unknown locations, cannot be assessed and covered with a programmatic ITS.

As such, in order to prevent takes from an assumed program, federal oversight of impacts to listed species must continue on an on-going basis. Indeed, as stated above, where discharges have a

⁴³ FDEP “White Paper” on ESA Consultation with Assumption Approval (via email from Noah Valenstein, FDEP, to Matt Leopold, EPA, and David Ross, EPA dated July 17, 2019), available at <https://beta.regulations.gov/document/EPA-HQ-OW-2020-0008-0008> (visited July 5, 2020) (FDEP White Paper).

⁴⁴ *Cooling Water Intake Structure Coal. v. United States Envtl. Prot. Agency*, 905 F.3d 49 (2d Cir. 2018).

⁴⁵ 79 FR 48300-01.

⁴⁶ *Id.*

reasonable potential for affecting listed species, federal oversight of a state assumed program is required under EPA regulations.⁴⁷

New Jersey, one of only two other states that have assumed Section 404 permitting, provides an example of how to structure state assumption so that state and federal cooperation ensure ESA compliance. The structure is efficient and provides a cooperative framework to ensure that species impacts are avoided where possible and that only in instances where impacts cannot be avoided is a take permit necessary. As part of its state assumption, and pursuant to EPA regulations, FWS, EPA and the State of New Jersey entered in a comprehensive and aligned MOA that allows for effective federal oversight when individual permits result in takes. The MOA sets forth an “alternative coordination” between the state and FWS regarding approximate impacts to species.⁴⁸ The MOA provides that the state and FWS coordinate on permit applications to avoid any takes. In instances where coordination between the state and the Service “fails to eliminate take considered ‘incidental take’ under the ESA, the State and/or applicant must seek authorization for such incidental take of federally-listed animal species under section 10(a)(1)(B) of the ESA (the habitat conservation planning process).”⁴⁹ Additionally, EPA must ensure that applicant has been advised that their project has not undergone ESA Section 7 consultation and would therefore be in violation of New Jersey state law and Section 9 of ESA if an unpermitted take occurs.⁵⁰

The process in New Jersey ensures that ESA listed species impacts are evaluated on an on-going basis, avoiding takes where practical and ensuring that where takes cannot be avoided, ESA compliance occurs and species are protected.⁵¹ If the state cannot show that it will satisfy federal concerns regarding a permit application, the permit is transferred back to the Corps to be administered.⁵² ⁵³ New Jersey provides a model that allows for needed continued federal oversight of a state permitting program to ensure ESA compliance and prevent the take of species. While other models may suffice, the impossibility of reasonably accounting for future

⁴⁷ 40 C.F.R. 233.51(b)(2).

⁴⁸ Memorandum of Agreement, Dec. 22, 1993, U.S. EPA & FWS-NJDEPE. (<https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=EPA-HQ-OW-2020-0008>).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ It is worth noting that regulations covering review of federal programs similarly provide for on-going consideration of impacts on listed species where the program covers a multitude of future actions that cannot reasonably be evaluated through a programmatic consultation. Under Service regulations:

For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.⁵³ 50 C.F.R. § 402.14(i)(6).

While this regulation is intended for federal programs where future federal actions would be subject to separate Section 7 consultation, it recognizes that programmatic review cannot account for future takes from yet unknown actions.

takes of listed species from state administration of the Section 404 program requires on-going federal involvement and cannot be handled with a one-time ITS.

Potential Impact to Species

Over one-third of the threatened and endangered species in the United States exist solely in wetlands.⁵⁴ Almost half depend on wetland habitats for survival.⁵⁵ Therefore, any change in regulating activities that may degrade or destroy wetlands will affect listed species. Because Florida is seeking to assume the CWA Section 404 permitting program, it makes sense to examine some of the listed species that would be impacted by state assumption of Section 404 in Florida. As detailed below, Florida is home to some of America's most treasured and well-known ESA listed species. The potential impacts to these species highlights the importance of Section 7 consultation to help ensure that Florida's proposed Section 404 program is protective of these species. Potential impacts to species also illustrate the need for continued federal oversight of state Section 404 permitting ensure that the discharges of dredge and fill materials into Florida's waters do not impact these species.

Florida Panther

The Florida Panther is the only known breeding population of the *Puma* species left in the Eastern United States.⁵⁶ It is an iconic Floridian megafauna, designated as the state mammal by the Florida State legislature in 1982.⁵⁷ The species is a source of pride for Floridians, yet has had a tumultuous history in the state, and broader gulf coast region.

The Florida panther is one of America's most critically endangered species. In the 1970's, the panther faced extinction, with a population of only twenty individuals.⁵⁸ Human development and encroachment into Panther habitat led to a diminished range and genetic diversity within the species.⁵⁹ The Department of the Interior listed the Florida Panther as an endangered subspecies in 1967.⁶⁰

The Florida panther's range once extended from Florida through the gulf states and Arkansas.⁶¹ Today, the panther's numbers have increased slowly, but gene flow remains the major threat to the population.⁶² The species restricted to five percent of its historical range and a single

⁵⁴ USFWS, American Wetlands Month, <https://www.fws.gov/home/feature/2009/Wetland/fishandhabitat.htm> (last visited July 6, 2020).

⁵⁵ *Id.*

⁵⁶ USFWS, Florida Panther, <https://www.fws.gov/southeast/wildlife/mammals/florida-panther/> (last visited July 6, 2020).

⁵⁷ University of Florida, Florida's State Animals, https://sfyl.ifas.ufl.edu/archive/hot_topics/environment/florida_state_animals.shtml (last visited July 6, 2020).

⁵⁸ USFWS, Florida Panther, <https://www.fws.gov/southeast/wildlife/mammals/florida-panther/> (last visited July 6, 2020).

⁵⁹ *Id.* at 9.

⁶⁰ *Id.* at 34.

⁶¹ NWF, Florida Panther, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Mammals/Florida-Panther> (last visited July 6, 2020).

⁶² USFWS, Florida Panther, https://www.fws.gov/refuge/florida_panther/wah/panther.html (last visited July 6, 2020).

breeding population lives in South Florida.⁶³ In the 1990's, the FWS initiated a recovery project to increase genetic diversity by interbreeding with populations of panthers in Texas.⁶⁴ This project has improved prospects for the Florida Panther, but the threat of habitat fragmentation remains a pressure on the Panther's future success.⁶⁵

The Florida Panther inhabits a broad range of habitats within the state. Like many large carnivores, panthers require large swaths of contiguous habitat.⁶⁶ Habitat fragmentation threatens the Panther's social, breeding, and hunting needs.⁶⁷ Tracking data demonstrates that the Panther selects habitat that includes forests, grasslands, and marsh shrub swamps.⁶⁸ As carnivores, panthers prey upon deer, hogs, raccoons, and are opportunistic predators.⁶⁹ As historical habitat is transformed into agricultural lands, the Panther will also occasionally prey upon livestock and pets.⁷⁰ Human development fragments Panther populations, resulting in loss of genetic diversity and increased mortality due to car collisions and other human interactions.⁷¹

Filling wetlands under Section 404 of the CWA would almost certainly affect the Florida Panther and its recovery. Panthers depend upon a wide array of habitats, including cypress and hardwood swamps.⁷² Panthers and their favorite prey species depend on both freshwater and estuarine wetland ecosystems.⁷³ By filling wetlands for agriculture or energy projects, the Panther's habitat will likely become further fragmented both by the fill activity as well as the development such fill will induce and enable. With a lack of contiguous territory, more human-panther confrontation will almost certainly result. Decreased natural prey will increase livestock predation, and increased morbidity from car crashes. Additionally, fragmented habitat will increase conflict among panthers. The most common cause of death for adult males is aggression between panthers.⁷⁴

Elkhorn Coral

Elkhorn Coral is one of several species of Coral that is listed as "threatened" under the Endangered Species Act.⁷⁵ Over thousands of years, Elkhorn and other species of coral have built complex reefs off the coast of Florida and throughout the Caribbean.⁷⁶ Coral reefs serve as

⁶³ *Id.*

⁶⁴ USFWS, Florida Panther Recovery Plan, <https://www.fws.gov/uploadedFiles/Panther%20Recovery%20Plan.pdf> at 72, (last visited July 6, 2020).

⁶⁵ *Id.* at 89.

⁶⁶ *Id.* at viii.

⁶⁷ *Id.* at 87.

⁶⁸ USFWS, Florida Panther, <https://www.fws.gov/southeast/wildlife/mammals/florida-panther/#conservation-challenges-section> (last visited July 6, 2020).

⁶⁹ USFWS, Florida Panther, <https://www.fws.gov/southeast/wildlife/mammals/florida-panther/#historical-range-section> (last visited July 6, 2020).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² USFWS, Florida Panther Recovery Plan, <https://www.fws.gov/uploadedFiles/Panther%20Recovery%20Plan.pdf> at 28, (last visited July 6, 2020).

⁷³ *Id.*

⁷⁴ *Id.* at 21.

⁷⁵ USFWS, Environmental Conservation Online System, <https://ecos.fws.gov/ecp0/pub/SpeciesReport.do?groups=P&listingType=L&mapstatus=1> (last visited July 6, 2020).

⁷⁶ NOAA, Elkhorn Coral, <https://www.fisheries.noaa.gov/species/elkhorn-coral#overview> (last visited July 6, 2020).

important habitats for a multitude of marine species.⁷⁷ Since Elkhorn corals get their food from photosynthetic algae that live inside the coral cells, they populate the Florida coastline at depths where the light can penetrate through the water.⁷⁸ As habitat just offshore, they serve as an important ecosystem for juvenile and adolescent fish after they leave the safety of the coastal mangroves.⁷⁹ Many of these fish have value through commercial and sport fishing.

Elkhorn Corals, along with many other species of Coral, face a number of threats. Numbers in the Florida Keys are currently decreasing. A disease wiped out approximately 97 percent of the Elkhorn coral in the world.⁸⁰ Currently, the greatest threat to Elkhorn Coral is climate change. Increased ocean temperatures cause corals to release the algae, upon which they rely for food. Bleaching can quickly lead to mass coral death.⁸¹ Ocean acidification, poor reproductive success, and unsustainable fishing practices are a few of the other threats to this ancient ecosystem builder.⁸² Although the corals live off the coast of Florida, land-based practices can also have a serious effect on coral health.

Land-based pollution can affect the survivorship of the Elkhorn Coral in a few ways. Increased sedimentation and turbidity in the water interferes with the photosynthetic algae upon which the coral rely for food.⁸³ Cloudy water blocks the sunlight needed for this species to thrive. Suspended fine sediment also diminishes the survival and settlement of coral larvae.⁸⁴

The destruction and degradation of Floridian wetlands and other waters through dredged and fill activities are a major source of sedimentation. When wetlands are destroyed or degraded by development, their ability to retain rainwater and other precipitation events is diminished, leading to greater erosion and sediment loading into streams, rivers and estuaries that flow into coral reef habitat.⁸⁵ The disturbance activities in these waters can also directly result in sedimentation. Coral reefs are on the brink of collapse, and Elkhorn Corals are an important building block of a reef ecosystem. NMFS consultation prior to wetland and coastal development would identify critical habitat and protect the reefs from future projects.

West Indian Manatee

The West Indian Manatee and its subspecies are federally listed as threatened under the Endangered Species Act.⁸⁶ Referred to as “sea cows,” Manatees eat sea grass leaves and rhizomes as well as other aquatic plants. In the last 25 years, the Manatee population in Florida rebounded from roughly 1,200 to over 6,000 today. Although mostly found throughout the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Erftemeijer et al. “Environmental impacts of dredging and other sediment disturbances on corals: A review.” *Marine Pollution Bulletin*. Volume 64, Issue 9, September 2012, Pages 1737-1765.

⁸⁴ *Id.*

⁸⁵ EPA, Why Are Wetlands Important, <https://www.epa.gov/wetlands/why-are-wetlands-important> (last visited July 6, 2020).

⁸⁶ USFWS, West Indian Manatee, <https://www.fws.gov/southeast/wildlife/mammals/manatee/> (last visited July 6, 2020).

coastal habitat of Florida, Manatees can travel as far north as Massachusetts during summer months. Manatees inhabit a variety of habitats along the Florida coast, including marine, brackish, and freshwater habitats.

The primary threats to manatees are human interaction and encroachment on habitat. Fishing gear entanglements and boat collisions maim and kill manatees throughout coastal Florida.⁸⁷ Coastal development also fragments sea grass feeding grounds. Manatees, unlike most marine mammals, require warm water. When water temperatures drop below 20°C, Manatees seek out sources of warm water.⁸⁸ During winter months, manatees rely on artesian springs as critical sources of warmth.⁸⁹ Manatees also need to drink freshwater from these wells.

Manatees have an important value in Florida's marine ecosystems and its economy. Tourists come from far and wide to see Manatees in the wild. As grazers, they manipulate and replenish the seagrass beds that so many other species rely on.⁹⁰ Impacts to wetland and water due to dredged and fill activities can negatively impact manatees by reducing sea grass bed area. Development that diminishes freshwater artesian well springs impacts the manatee's access to drinking water and warm water havens during the winter.⁹¹ Nutrient loading from sewage, manure and fertilizers can expose Manatees to algae that is toxic when eaten.⁹² Wetland projects degrade water quality, disturbing seagrass beds and the Manatees that depend on them for forage.⁹³

Whooping Crane

The Whooping Crane is often portrayed as the face of the Endangered Species Act since it was listed in 1970.⁹⁴ The crane's name comes from its distinctive vocalization when it is distressed.⁹⁵ The Whooping Crane is the tallest bird in North America, and it is found on no other continent in the world. There is a small, captive raised population in Florida that was established in 2001. This group migrates between Florida and Wisconsin seasonally. They inhabit a range of wetland habitats throughout their migration and depend on freshwater marshes and estuaries for breeding, foraging, and rearing their young.⁹⁶ Boating and proximity to human development disturbs the

⁸⁷ *Id.*

⁸⁸ Stith, Bradley M., et al. "Temperature Inverted Haloclines Provide Winter Warm-Water Refugia for Manatees in Southwest Florida." *Estuaries and Coasts*, vol. 34, no. 1, 2011, pp. 106–119.

⁸⁹ *Id.*

⁹⁰ Castelblanco-Martínez, et al. "The Trophic Role of the Endangered Caribbean Manatee *Trichechus Manatus* in an Estuary with Low Abundance of Seagrass." *Estuaries and Coasts*, vol. 35, no. 1, 2012, pp. 60–77.

⁹¹ Defenders of Wildlife, Florida Manatee, <https://defenders.org/wildlife/florida-manatee> (last visited July 6, 2020).

⁹² NOAA, Endangered Ocean: Manatees, <https://oceanoday.noaa.gov/endocceanmanatees/> (last visited July 6, 2020).

⁹³ USFWS, Seagrasses, <https://www.fws.gov/verobeach/MSRPPDFs/Seagrass.pdf> at 3-597, (last visited July 6, 2020).

⁹⁴ USFWS, International Recovery Plan https://ecos.fws.gov/docs/recovery_plan/070604_v4.pdf at xi, (last visited July 6, 2020).

⁹⁵ USFWS, Whooping Crane, <https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=758> (last visited July 6, 2020).

⁹⁶ *Id.*

Whooping Cranes normal behavior.⁹⁷ Although they can live up to thirty years in the wild, Whooping Cranes have low reproductive rates.⁹⁸

Despite reintroduction efforts, there is only a single self-sustaining population, migrating between Canada and the coastal marshes of Texas.⁹⁹ A confluence of disturbances in the crane's wetland habitats led to a severe population crash, and recent recovery efforts have led to a slow increase in numbers, but the species remains critically endangered.¹⁰⁰

Impacts to wetland and other water from dredged and fill activities have enormous potential to disturb the few Whooping Cranes remaining in Florida.¹⁰¹ The mere presence of human activity disturbs the natural behavior of the cranes.¹⁰² Converting wetland habitat to agriculture and development projects has displaced Whooping Cranes for decades.¹⁰³ Whooping cranes depend on marshes for nearly every element of their life history. Destruction of winter wetland habitat in Florida also impacts distant populations that border Canada due to their migratory behavior. Changes in wetlands protections in Florida or other states due to state assumption would almost certainly affect this species and could result in jeopardy.

Okeechobee Gourd

Wetlands cover only five percent of the surface land in the continental United States, yet they provide habitat for 31 percent of plant species.¹⁰⁴ The Okeechobee Gourd is a vine that is native to South Florida and was federally listed as endangered in 1993.¹⁰⁵ The gourd had a historical range from Lake Okeechobee to the Everglades.¹⁰⁶ The gourd historically grows in pond apple forests found along the rim of lakes and wetlands in South Florida.¹⁰⁷ The gourd uses the pond apple branches as a natural trellis but will climb nearly any plant that will support it.¹⁰⁸ The gourd is often found near alligator nests, which uproot other plants, and promote the gourd's growth.¹⁰⁹ The vine relies on fluctuations in lake levels to survive.¹¹⁰ Floods inundate and kill more aggressive plants, and when levels drop, the gourds proliferate.¹¹¹ Although specifics of its

⁹⁷ USFWS, International Recovery Plan, https://ecos.fws.gov/docs/recovery_plan/070604_v4.pdf at xi, (last visited July 6, 2020).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ USFWS, Whooping Crane, <https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=758> (last visited July 6, 2020).

¹⁰² *Id.*

¹⁰³ USFWS, International Recovery Plan, https://ecos.fws.gov/docs/recovery_plan/070604_v4.pdf at 1, (last visited July 6, 2020).

¹⁰⁴ USFWS, American Wetlands Month, <https://www.fws.gov/home/feature/2009/Wetland/fishandhabitat.htm> (last visited July 6, 2020).

¹⁰⁵ USFWS, North Florida Ecological Services Office, https://www.fws.gov/northflorida/Species-Accounts/North_Florida_Fed_TE_Species_Info.htm (last visited July 6, 2020).

¹⁰⁶ USFWS, Okeechobee Gourd, <https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=5999> (last visited July 6, 2020).

¹⁰⁷ USFWS, Okeechobee Gourd, <https://www.fws.gov/verobeach/MSRPPDFs/Okeechobee.PDF> at 4-933, (last visited July 6, 2020).

¹⁰⁸ *Id.* at 4-935.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 4-936

¹¹¹ *Id.*

seed dispersal strategies are largely unknown, studies suggest that the gourds disperse their seeds by floating in the water to new habitats.¹¹²

The major threats to the Okeechobee gourd are conversion of swamp and marshland into agriculture fields and other projects affecting the natural water level fluctuations of aquatic environments in Florida.¹¹³ Introduction of exotic woody plants also hamper efforts to recover gourd populations.¹¹⁴ Dredge and fill operations and the destruction of pond apple forests have directly led to the reduction of Okeechobee gourd populations. State assumption by Florida of the Section 404 program would likely affect this listed plant and could result in jeopardy.

Conclusion

Thank you for the opportunity to comment. The EPA should reconsider its position that the holding in NAHB applies to the approval of state assumption of Section 404 of CWA. EPA approval of state assumption of the Section 404 permitting program is a discretionary action that triggers Section 7 consultation with FWS and NMFS. However, such consultation must preserve on-going federal oversight of state permitting to ensure that ESA listed species are protected and takes do not occur or are accounted for on a permit-by-permit basis.

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¹¹² Walters, T.W., D.S. Decker-Walters, and S. Katz. 1992. "Seeking the elusive Okeechobee gourd." *Fairchild Tropical Garden Bulletin* 47(1)23-30.

¹¹³ *Id.*

¹¹⁴ *Id.*